

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, NOVEMBER 7, 2023

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, November 7, 2023, at 10:00 a.m., in Council Chambers, with the following present:

Michael H. Vincent	President
John L. Rieley	Vice President
Cynthia C. Green	Councilwoman
Douglas B. Hudson	Councilman
Mark G. Schaeffer	Councilman
Todd F. Lawson	County Administrator
Gina A. Jennings	Finance Director
J. Everett Moore, Jr.	County Attorney

The Invocation and Pledge of Allegiance were led by Mr. Vincent.

**Call to
Order**

Mr. Vincent called the meeting to order.

**M 524 23
Approve
Agenda**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley, to approve the Agenda as presented.

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

Minutes

The minutes from October 24, 2023, were approved by consensus.

**Corre-
spondence**

There was no correspondence.

Public comments were heard.

**Public
Comments**

Mr. Charles C. Clark, IV spoke about paperwork that was filed that described him as being violent.

Ms. Patty Deptula thanked Veterans for their service and discussed development of Sussex County.

Ms. Janet Ligabel spoke about hiring in house legal Counsel and a paralegal staff, homeless shelters and land in Sussex County.

Ms. Judy Rose Siebert spoke about the land use document specifically the section for comments under Ordinance No. 23-05.

**M 525 23
Approve
Consent
Agenda**

A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to approve the following item under the Consent Agenda:

**Use of Existing Wastewater Infrastructure Agreement – IUA 943-1
Sandy Shores Village, Johnson’s Corner Area**

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**M 526 23
Stillwater
Harbor
Subdivision
Appeal**

A Motion was made by Mr. Vincent, seconded by Mr. Hudson that in the matter of the Stillwater Appeal, I move that the Council affirm the Planning and Zoning Commission’s decision to deny the Preliminary Subdivision Plan filed by Stillwater Harbor, LLC for the Stillwater Harbor subdivision. I will provide reasons which are based on the standard of review read by our attorney, Mr. Moore, at the start of the hearing which are incorporated herein by reference. This is a summary only, which will not include citations and more expansive reasoning. Those can be found in the comprehensive written findings given to the Clerk of the Council with this motion to publish in the record and are incorporated by reference. The written findings for introduction into the record which are incorporated by reference and deemed part of this motion were provided to the Clerk of the Council.

In its September 29, 2023, appeal letter, Appellant alleges that the Preliminary Subdivision Plan should have been automatically approved when the Commission did not act on the Plan within 45 days.

Despite Appellant’s contention, the 45-day clock does not start to run until the record has been closed. To do otherwise would require the Commission to render a decision without the ability to review the complete record, which includes all relevant facts, supporting documents, comments from various agencies, staff, and legal counsel. The record for this Application was not closed until June 8, 2023, when Chairman Wheatley stated, “...we will now officially close the record for Stillwater Harbor.” On June 22, 2023, the Commission voted unanimously to deny the Plan. This vote took place fourteen (14) days after the record was closed and was well within the 45-day period.

The Commission Engaged in an Orderly and Logical Review of the Evidence which Involved the Proper Interpretation and Application of the Law.

The Commission provided comprehensive reasons for its unanimous denial of the Plan. In fact, the Commission’s motion covered 19 pages of transcript and contained 12 reasons, three of which contained between six and eight subsections with additional points. This is one of the longest motions the

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Harbor
Subdivision
Appeal
(continued)**

Commission has presented. It clearly demonstrates the Commission's decision was the result of an orderly and logical review of the evidence, that there was substantial evidence in the record to support its decision and that it engaged in the proper interpretation and application of the chapter.

Appellant relies upon a Delaware Supreme Court decision which held that, "when people who own land zoned for a specific use are entitled to rely on the fact that they can implement that use, provided the project complies with the subdivision ordinances subject to reasonable conditions imposed by the Planning Commission to minimize impact." This is the proper standard. However, the Plan simply does not comply with Sussex County Code, § 99-17B and the Appellant did not effectively address the mandatory considerations for all subdivision applications in Sussex County Code, § 99-9C.

A. The Plan Does Not Comply with Sussex County Code, § 99-17B.

First, Sussex County Code, § 99-17B. mandates that, "the access to the subdivision shall be from a public highway having a width of at least 50 feet". The record includes testimony from the Appellant's engineer that the width of the right of way varies from 42 to 46 feet. The Appellant's failure to provide Code compliant subdivision access left the Commission no choice but to deny the Plan.

B. The Plan Does Not Comply with Sussex County Code, § 99-9C.

Second, Sussex County Code § 99-9C sets forth seventeen (17) mandatory factors the Commission must consider in its decision whether to approve or deny a subdivision plan. As mentioned before, the Planning and Zoning Commission considered all of these factors and outlined the Plan's deficiencies in detail in its motion.

C. The Imposition of Conditions will not Rectify Ongoing Flooding.

Third, imposing conditions based on Appellant's wide-ranging deficiencies under Section 99-9C and § 99-17B will not bring the Plan into compliance. For instance, the frequent flooding of River Road was emphasized in hearing testimony and in an opposition letter from the Indian River Volunteer Fire Company.

DNREC also raised the flooding and drainage issue, stating:

Residential properties and roads also flood regularly because of local runoff because of stormwater, drainage, and transportation infrastructure that is undersized or in disrepair" and that, "[d]rainage deficiencies included undersized or non-existent storm drain systems, storm drain systems that require maintenance, and low ground surface elevations. These deficiencies result in problems such as localized flooding, backwater flooding from inland marsh, or coastal inundation directly from Indian River Bay.

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Harbor
Subdivision
Appeal
(continued)**

DNREC and the Secretary of Delaware Department of Agriculture also expressed concern that the removal of forest lands will likely result in increased drainage issues and flooding risks to current and future residents. The Commission found that the Appellant did not seek alternative designs to mitigate the known drainage and flooding risks from the proposed forest removal despite the concerns expressed by DNREC and the Secretary.

The excessive flooding will also have a direct impact on transporting children to and from Stillwater Harbor. Currently, when River Road is flooded, local school children are frequently picked up and dropped off at the fire hall rather than their homes due to road closure. Based on hearing testimony, the Commission found that this "is a safety concern that currently exists, and it should not be made worse by approving more development with more school children who cannot be picked upon and dropped off at their regular location because of frequent weather events"

D. Jackson Draine Lane Does Not Benefit the Stillwater Harbor Lots and is Inadequate to Solve the Emergency Access Concern.

Fourth, while the Appellant attempts to rectify the flooding issue through use of Jackson Draine Lane for emergency access, Jackson Draine Lane is a "12-foot-wide unimproved road" which is a private easement benefiting a limited number of properties. Stillwater Harbor's 123 lots are not among those properties benefiting from the easement. In attempt to gloss over this issue, Appellant relies on 16 *Del. C.* §6701A for the premise that a fire company is authorized to trespass on property in response to a fire or other emergency.

The Commission cannot condone the unauthorized use and make land use decisions for the general public welfare, based on foreseeable trespasses over property that is not part of Stillwater Harbor. That would be overreaching and could result in Jackson Draine Lane becoming a regularly used means of ingress and egress for Stillwater Harbor lot owners which, for a multitude of reasons, it is clearly not suitable.

The foregoing facts demonstrate multiple deficiencies in the Plan presented to the Commission. These facts were collectively confirmed by statements in the record at the public hearing and, there is substantial evidence in the record to deny the Plan based solely on Appellant's inability to comply with Sussex County Code § 99-17B, let alone § 99-9C.

The Commission's findings include detailed, thorough, and well-thought-out reasons for its unanimous vote to deny the Plan. Of utmost importance, is the failure to provide Code compliant subdivision access over a public highway that is at least 50 feet in width as mandated by the Sussex County Code. This deficiency is only exacerbated by the road's habitual flooding, which is common and well-known in the area, and was acknowledged by the Indian River Volunteer Fire Co., DeIDOT, DNREC and the Appellant's own engineer's testimony at the public hearing, as well as that of local residents.

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Harbor
Subdivision
Appeal**

For the reasons above which are considered a part of this motion, together with the entire written findings which have already been introduced into the record, I hereby move that the Council affirm the Planning and Zoning Commission's decision to deny the Plan.

Mr. Moore noted that this includes the written formal opinion and findings that was introduced to the Clerk of the Council. (The documents are attached to these minutes.)

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**4th Quarter
Shining Star
Award**

Mrs. Brewington presented the Fourth Quarter Shining Star Awards. She reported that there were 31 nominations received this quarter with Lindsey Behney from the Register of Wills Office being selected as the quarter winner.

**Develop-
ment Design
Priorities &
Next Steps**

Mr. Lawson led a discussion related to Development Design priorities and next steps. Mr. Lawson reminded Council that on September 21, 2023, a joint workshop was held related to development design. After that, a presentation was given to the County Council providing a summary of the ideas in 6 broad categories. These categories include perimeter buffers, forest preservation, open space, interconnectivity, County Code Updates – Miscellaneous and County Code Updates – Superior Design. County Council Members and Planning & Zoning Commissioners were then asked to rank their priorities.

Mr. Lawson then reviewed the Planning & Zoning priority rankings. The rankings were as follows from highest to lowest priority: open space, forest preservation, County Code – Superior Design, perimeter buffer, interconnectivity, and County Code – Miscellaneous Codes.

The County Council priority rankings were then reviewed. The rankings were as follows from highest to lowest priority: perimeter buffers, open space, County Code – Miscellaneous Codes, interconnectivity, forest preservation and County Code – Superior Design.

Mr. Lawson reported that after reviewing the County Council & PZ Commission priority rankings were as follows from highest to lowest: open space (tie 1st), perimeter buffers (tie 1st), forest preservation (tie 2nd), interconnectivity (tie 2nd), County Code – Superior Design and County Code – Miscellaneous Codes.

Mr. Lawson commented that the Master Plan Zoning Ordinance, Workforce Housing and Solar Arrays are also incentives that are currently underway.

Development Design Priorities & Next Steps (continued)

Mr. Lawson noted that staff's feedback is that perimeter buffers should be first. He added that any Ordinances that are produced with have to go through both Commission and Council.

Personnel Board Appt.

Mr. Lawson reported that there are two members on the Personnel Board that need to be reappointed. Dr. Michael Owens and Mrs. Joan Neal have agreed to continue to serve.

M 527 23 Approve Personnel Board Reappointments

A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer, that be it moved that Sussex County Council reappoint Dr. Michael Owens and Mrs. Joan Neal to the Sussex County Personnel Board effective January 1, 2024 for a term of three years.

Motion Adopted: 5 Yeas

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea; Mr. Hudson, Yea; Mr. Rieley, Yea; Mr. Vincent, Yea

Administrator's Report

Mr. Lawson read the following information in his Administrator's Report:

1. Projects Receiving Substantial Completion

Per the attached Engineering Department Fact Sheets, the following projects have received Substantial Completion: Arbor Lyn – Phase 5 (Construction Record) effective October 19th; Beach Tree Preserve – Phase 2B (Construction Record) effective October 19th; Americana Bayside – Coastal Crossing – Phase 2 effective October 20th and El Rancho effective October 25th.

2. Shirley Hitchens

It is with great sadness that we inform you that pensioner, Shirley Hitchens, passed away on Sunday, October 29, 2023. Mrs. Hitchens began her career with Sussex County in September 2005 where she worked until February 2019 for a total of 13 years of service. Her last position with the County was Clerk III in the Assessment Office. We would like to extend our condolences to the Hitchens family.

[Attachments to the Administrator's Report are not attached to the minutes.]

Public Hearing/ Greenwood Storage

A Public Hearing was held for the Greenwood Storage Annexation of the Sussex County Unified Sanitary Sewer District (Western Sussex Area). John Ashman, Director of Utility Planning & Design Review reported that County Council granted permission to prepare and post notices for a public

**Annexation
into
SCUSSD**

hearing for the Greenwood Storage Expansion on September 19, 2023. The Engineering Department received a request from Davis, Bowen & Friedel, Inc. on behalf of their client, DESTORAGE.COM GREENWOOD, LLC owners/developers of parcels 530-10.00-55.00, 56.00 & 56.02. The parcels are zoned HC, Highway Commercial and are within the Greenwood Municipal Limits and Sussex County provides the sanitary sewer service for the town. The parcels are primarily located in the Tier 2 Area for sewer service, with one parcel partially in Tier 1 and will be responsible for System Connection Charges of \$7,700 per EDU based on current rates. The properties were posted on October 13, 2023, and added to the County website. To date, there has been no correspondence either in support or opposition to this annexation.

Mrs. Green noted that the Town of Greenwood has a water main line and a fire hydrant on the property and wanted to confirm that they would have access to them. Mr. Ashman replied that there should be an easement and added that it can be confirmed when the plans are submitted. Mr. Medlarz added that this goes through the Town of Greenwood Land Use review process, and they would make the request at that time.

There were no public comments.

The Public Hearing and public record were closed.

**M 528 23
Adopt
Resolution
No. 020 23**

A Motion was made by Mrs. Green, seconded by Mr. Hudson to Adopt Resolution No. R 020 23 entitled "A RESOLUTION TO EXTEND THE BOUNDARY OF THE SUSSEX COUNTY UNIFIED SANITARY SEWER DISTRICT (SCUSSD), TO INCLUDE PARCELS 530-10.00-55.00, 56.00 & 56.02 ON THE EAST SIDE OF SUSSEX HIGHWAY. THE PARCELS ARE LOCATED IN THE NORTHWEST FORK HUNDRED, SUSSEX COUNTY, DELAWARE, AND RECORDED IN THE OFFICE OF THE RECORDER OF DEEDS, IN AND FOR SUSSEX COUNTY, DELAWARE".

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**Public
Hearing/
Vines Creek
Crossing
Annexation
into
SCUSSD**

A Public Hearing was held for the Vines Creek Crossing Annexation of the Sussex County Unified Sanitary Sewer District (Dagsboro/Frankford Area). Mr. Ashman reported that County Council granted permission to prepare and post notices for a public hearing on September 12, 2023. The Engineering Department had received a request from Davis, Bowen & Friedel, Inc. on behalf of their client Double H Development, LLC, developers of parcels 533-1.00-38.00, 533-4.00-28.00 & 28.01 located between Pepper Road and Frankford School Road. The parcels have been annexed into the Town of Frankford and Sussex County provides the

**Public Hearing/
Vines Creek
Crossing
Annexation
into
SCUSSD
(continued)** **sanitary sewer service for the town. The parcels are located in the Tier 2 Area for sewer service and will be responsible for System Connection Charges of \$7,700 per EDU based on current rates. The properties were posted on October 13, 2023, and added to the county website. To date, there has been no correspondence either in support or opposition received.**

There were no public comments.

The Public Hearing and public record were closed.

**M 529 23
Adopt
Resolution
No. R 021 23
Vines Creek
Crossing** **A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to Adopt Resolution No. R 021 23 entitled “A RESOLUTION TO EXTEND THE BOUNDARY OF THE SUSSEX COUNTY UNIFIED SANITARY SEWER DISTRICT (SCUSSD) DAGSBORO/FRANKFORD AREA, TO INCLUDE PARCELS 533-1.00-38.00, 533-4.00-28.00 & 28.01 ON THE EAST SIDE OF PEPPER ROAD, THE SOUTH SIDE OF FRANKFORD SCHOOL ROAD, THE PARCELS ARE LOCATED IN THE DAGSBORO HUNDRED & BALTIMORE HUNDRED, SUSSEX COUNTY, DELAWARE AND RECORDED IN THE OFFICE OF THE RECORDER OF DEEDS, IN AND FOR SUSSEX COUNTY, DELAWARE”.**

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

**Proposed Ordinance/
Lochwood** **Hans Medlarz, County Engineer presented a Proposed Ordinance for Council’s consideration for increased costs of the construction and equipping of an extension of sanitary sewer services to Lochwood for Council’s consideration.**

**Introduction
of Proposed
Ordinance** **Mr. Vincent introduced a Proposed Ordinance entitled “Discussion and Possible Introduction of a Proposed Ordinance entitled “AN ORDINANCE TO AMEND ORDINANCE NO. 2787 TO AUTHORIZE THE ISSUANCE OF UP TO A TOTAL OF \$5,187,000 OF GENERAL OBLIGATION BONDS OF SUSSEX COUNTY TO COVER THE INCREASED COSTS OF THE CONSTRUCTION AND EQUIPPING OF AN EXTENSION OF SANITARY SEWER SERVICES TO LOCHWOOD AND AUTHORIZING ALL NECESSARY ACTIONS IN CONNECTION THEREWITH”.**

**Old Business/
CZ1973** **Under Old Business, Jamie Whitehouse presented a Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM A MR-RPC MEDIUM DENSITY RESIDENTIAL DISTRICT – RESIDENTIAL PLANNED COMMUNITY TO A MR-RPC MEDIUM DENSITY RESIDENTIAL DISTRICT – RESIDENTIAL PLANNED COMMUNITY TO AMEND CHANGE OF ZONE NO. 1759 (ORDINANCE NO. 2475) TO INCLUDE A**

**Old
Business/
CZ1973
(continued)**

1.85 ACRE MARINA & RESTAURANT AMENITY AREA FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES AND REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 126.8795 ACRES, MORE OR LESS” (property lying on the southwest side of Old Landing Road [S.C.R. 274], within the Osprey Point Residential Planned Community, on the north end of Ethan Allen Drive, approximately 0.12 mile west of Old Landing Road [S.C.R. 274]) (911 Address: N/A) (Tax Parcels: 334-18.00-83.00, 83.17, 83.20, 83.21 & 1073.00 through 1289.00) filed on behalf of Osprey Point Preserve, LLC.

The County Council held a Public Hearing on the Application at its meeting on September 19, 2023. At the conclusion of the Public Hearing, the public record was closed and action on the application was deferred for further consideration.

**M 530 23
Amend
Condition
7 b/DENIED**

A Motion was made by Mr. Schaeffer, seconded by Mrs. Green to Amend Condition 7 b to read as follows “There shall be no more than 25 boat slips of non-motorized watercraft only within the marina”.

Motion Denied: 3 Nays, 2 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Nay; Mr. Rieley, Nay;
Mr. Vincent, Nay**

**M 531 23
Adopt
Ordinance
No. 2959/
CZ1973**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley to Adopt Ordinance No. 2959 entitled “AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM A MR-RPC MEDIUM DENSITY RESIDENTIAL DISTRICT – RESIDENTIAL PLANNED COMMUNITY TO A MR-RPC MEDIUM DENSITY RESIDENTIAL DISTRICT – RESIDENTIAL PLANNED COMMUNITY TO AMEND CHANGE OF ZONE NO. 1759 (ORDINANCE NO. 2475) TO INCLUDE A 1.85 ACRE MARINA & RESTAURANT AMENITY AREA FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES AND REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 126.8795 ACRES, MORE OR LESS” for the reasons and conditions given by the Planning & Zoning Commission as follows:

- 1. The Applicant is seeking to amend the Osprey Point Residential Planned Community approved as C/Z 1759 and Ordinance No. 2475 to add a commercial use to the RPC in the form of a restaurant and commercial marina. When Osprey Point was first approved, it did not include commercial uses.**
- 2. A rezoning application such as this is legislative in nature. Therefore, Sussex County has discretion in deciding whether to approve this amendment to the RPC. In this case, there was substantial opposition to the request from neighboring property owners citing concerns about the incompatibility of commercial uses with the surrounding residential areas, increased traffic, increased noise, and**

**M 531 23
Adopt
Ordinance
No. 2959/
CZ1973
(continued)**

- other negative impacts of the request. I find all of this to be compelling and in support of a denial of this request.
3. **The Sussex County Zoning Code permits certain limited commercial uses within an RPC. It states that “commercial uses of convenience and necessity to the development as a whole” may be permitted. In this case, the proposal seeks to allow a waterfront restaurant to be built within this otherwise residential community, which is itself surrounded by residential development. Waterfront restaurants, by their nature, are very popular attractions and there are not many of them in Sussex County. One such example is Paradise Grill within the Pot Nets residential community. It is common knowledge that it attracts customers from far and wide given its location and views. Such a restaurant would be no different here, and it would clearly not only be “for the convenience and necessity of” Osprey Point as required by the Zoning Code. What is proposed does not fall under the type of commercial use that is permitted in an RPC.**
 4. **At the time Osprey Point was approved by Ordinance No. 2475, the residential density of the development was substantially reduced because of opposition to the density that was originally proposed. The Ordinance states that the original density and housing types were inconsistent with the surrounding residential communities. A destination-waterfront restaurant would certainly be a more intensive use than anything else in this area of Old Landing Road. I see no compelling reason to go backward against the determination in 2016 to reduce the intensity of the RPC by permitting more intensive commercial uses within the residential development and its surrounding neighborhood now.**
 5. **Old Landing Road is a two-lane, dead-end winding road. It is not currently suited to handle the increased traffic, pedestrians, bikers, trash trucks, and delivery vehicles that would be utilizing this destination restaurant if approved.**
 6. **In summary, I do not see any legitimate reason to permit an intensive commercial use in the form of what would certainly be a waterfront-destination restaurant that will attract customers from far and wide beyond the confines of just Osprey Point. What has been asked for exceeds what is intended for the limited commercial uses within an RPC. For all of these reasons, it is recommended that the request to amend C/Z 1759 and Ordinance No. 2475 to allow commercial uses in the form of a restaurant and commercial marina within the RPC should be denied.**
 7. **However, I am recommending approval of a marina of no more than 25 boat slips for the exclusive use of the residents of Osprey Point. The slips in this marina may not be bought, sold, leased, or occupied by anyone other than property owners within Osprey Point. The approval of this marina as an amenity for Osprey Point is subject to the following conditions:**
 - A. **This marina shall be an amenity for the property owners within Osprey Point and shall be limited to use by boats owned by property**

**M 531 23
Adopt
Ordinance
No. 2959/
CZ1973
(continued)**

owners within Osprey Point. No slips shall be bought, sold, leased, or occupied by anyone other than owners of residential units within Osprey Point.

- B. There shall be no more than 25 boat slips within the marina.**
- C. No boats shall be repaired or refueled at the marina.**
- D. There shall not be any pump-out location on the docks or within the marina.**
- E. DNREC approval shall be obtained for the marina use prior to Final Site Plan approval.**
- F. The existing Final Site Plan for Osprey Point shall be revised to include this marina as an amenity for the property owners within the development. The revised Final Site Plan shall include Condition A above. The Revised Final Site Plan shall be subject to the review and approval of the Sussex County Planning & Zoning Commission.**

Motion Adopted: 4 Yeas, 1 Nay

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Nay;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

Mr. Schaeffer voted no based on the following reasons:

I agree with the Planning and Zoning Commission's recommendation to deny the restaurant and a commercial marina, but I disagree with its recommendation to approve a marina for the use of Osprey Point residents for the following reasons:

- 1. All property owners in Osprey Point took title to their properties based on the approved Final Site Plan which did not contain any commercial uses. Adding a marina would be a substantial departure from the Final Site Plan and a significant change in use to which the current property owners have not agreed. Any type of marina will change the current residential character of the community.**
- 2. Any marina will increase the road traffic in that portion of the Osprey Point. The property owners could not have anticipated this since no marinas, commercial or otherwise, were included on the Final Site Plan.**
- 3. Any marina will also increase boat traffic, both from residents' boats as well as boats visiting from points outside the community. Again, the property owners could not have anticipated this since no marinas, commercial or otherwise, were included on the Final Site Plan.**
- 4. Any marina will have an adverse impact of the property owners' quiet enjoyment of the community with increased activity and noise, especially those property owners with lots in the vicinity of the**

proposed marina.

**M 531 23
(continued)**

For all of these reasons and those given by the Planning and Zoning Commission in regard to the denial of the restaurant and commercial marina, I believe this Application should be denied in its entirety.

**Old
Business/
MPZ
Ordinance**

Under Old Business, Mr. Whitehouse presented a Proposed Ordinance entitled “AN ORDINANCE TO DELETE CHAPTER 115, ARTICLE XVII VACATION RETIREMENT-RESIDENTIAL PARK DISTRICT SECTIONS 115-132 THROUGH 115-140 IN ITS ENTIRETY AND TO INSERT ARTICLE XVII MASTER PLAN ZONE, SECTIONS 115-132 THROUGH 115-140 IN ITS PLACE”.

The County Council held a Public Hearing on the Ordinance at its meeting on October 17, 2023. At the conclusion of the hearing, the Council deferred action on the Ordinance, leaving the Public Record open for receipt of additional written comments until the close of business on October 31, 2023. Mr. Whitehouse confirmed that additional comments were received.

**Grant
Requests**

Mrs. Jennings presented grant requests for Council’s consideration.

**M 532 23
Pop Warner
Little
Scholars,
Inc.**

A Motion was made by Mrs. Green, seconded by Mr. Hudson to give \$1,000 (\$1,000 from Mrs. Green’s Councilmanic Grant Account) to Pop Warner Little Scholars, Inc. (Woodbridge) for Florida Nationals.

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**M 533 23
Kim and
Evans
Family
Foundation**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$500 (\$500 from Mr. Vincent’s Councilmanic Grant Account) to Kim and Evans Family Foundation for their remembering the past and embracing the future event.

Motion Adopted: 5 Yeas

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**M 534 23
City of
Seaford**

A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to give \$1,000 (\$1,000 from Mr. Vincent’s Councilmanic Grant Account) to City of Seaford for their Annual Christmas Parade.

Motion Adopted: 5 Yeas

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;

**Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

Introduction of Proposed Ordinances Mr. Rieley introduced a Proposed Ordinance entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A POLICE STATION TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN DAGSBORO HUNDRED, SUSSEX COUNTY, CONTAINING 44 ACRES, MORE OR LESS” filed on behalf of the State of Delaware

Mr. Rieley introduced a Proposed Ordinance entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO ALLOW FOR AN ON-PREMISES ELECTRONIC MESSAGE CENTER SIGN TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 10.94 ACRES, MORE OR LESS” filed on behalf of St. Michael the Archangel Church

Mr. Hudson introduced a Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A MR-RPC MEDIUM DENSITY RESIDENTIAL – RESIDENTIAL PLANNED COMMUNITY DISTRICT FOR CERTAIN PARCELS OF LAND LYING AND BEING IN BALTIMORE HUNDRED, SUSSEX COUNTY, CONTAINING 73.95 ACRES, MORE OR LESS” filed on behalf of Beazer Homes, LLC.

The Proposed Ordinances will be advertised for a Public Hearing.

Council Member Comments Mr. Rieley commented that Land Trust had an open house at Hudson Park over the weekend that was well attended. The Rotary made an announcement that they intend to raise close to a million dollars for a can-do playground to be installed at that location.

Mr. Vincent commented that Mrs. Jennings was inducted into the Sussex Central High School Hall of Fame last Friday.

M 535 23 Adjourn At 11:19 a.m., a Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to adjourn.

Motion Adopted: 5 Yeas

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

Respectfully submitted,

**Tracy N. Torbert
Clerk of the Council**

{An audio recording of this meeting is available on the County's website.}

**APPEAL OF STANDARD SUBDIVISION PLAN DENIAL
FOR STILLWATER HARBOR, LLC
(STILLWATER HARBOR SUBDIVISION), APP. NO. 2021-23**

This is an appeal of the Planning and Zoning Commission’s (the “Commission”) denial of a subdivision application (the “Application”) for Stillwater Harbor Subdivision No. 2021-23 (“Stillwater Harbor”) filed by Stillwater Harbor, LLC (the “Appellant”). I move that the Council affirm the Commission’s denial of the Application for the following reasons:

Standard Of Review

The standard of review for appeals from Commission decisions does not permit Council to substitute its own opinion for that of the Commission, nor does it permit a rehearing of what was before the Commission. It was a hearing of record and the Council’s review is limited to that record.¹

In reviewing the Commission’s decision on appeal, Sussex County Code, § 99-39(2) states that:

“[t]he Council shall review the record of the hearing before the Commission and shall make a determination as to whether the Commission's decision was the result of an orderly and logical review of the evidence and involved the proper interpretation and application of the chapter....”

The Delaware Supreme Court held that the Commission’s consideration of subdivision plan application acts in a manner that is “partly in a ministerial and partly in a judicial capacity” [and, therefore, on appeal the appealing body must] determine whether the decision is supported by substantial evidence and is free from legal error. Substantial evidence ‘means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm’n*, 962 A.2d 235, 239 (Del. 2008). The Council’s review is “limit[ed] to correcting errors of law and determining whether substantial evidence exists to support the [Commission’s] findings of fact” and that “[w]hen substantial evidence exists, [the Council] will not reweigh it or substitute [its] own judgment for that of the [Commission].” *See Rehoboth Art League, Inc. v. Board of Adjustment of the Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010).

¹ In addition, the Council is not permitted to consider any issues and arguments raised by Appellant on appeal that were not raised below as such issues are considered waived on appeal. *See, e.g., Hartigan v. Sussex County Bd. of Adjustment*, 2018 WL 1559938 *3 (Del. Super.); *Rehoboth Art League*, 991 A.2d at 1166.

Therefore, if there is substantial evidence that demonstrates the Commission's decision was based on an orderly and logical review of the evidence and the law was accurately applied, the Council must uphold the Commission's approval.

The Commission Provided its Decision within the Required 45-Day Period

In its September 29, 2023, appeal letter ("Appeal Letter"), Appellant alleges that the Preliminary Subdivision Plan ("Plan") should have been automatically approved when the Commission did not act on the Plan within 45 days.² Appellant's argument is based on 9 *Del. C.* § 6811, which states in part:

"[t]he Commission shall approve or disapprove a plat within 45 days after the submission thereof, otherwise such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the Commission upon demand."

Appellant submitted its Plan on April 17, 2023. As outlined in the Commission's October 11, 2023, appeal response ("Commission's Response"), the public hearing was held on April 27, 2023, at which time the record was left open for three (3) specific purposes:

- (1) receive additional written comment (which the Applicant took full advantage of by submitting written comment and a video just before the deadline); (2) receive information about compliance with the County's Resource Buffer Ordinance; and (3) receive information from counsel about Jackson Draine Lane.³

Planning and Zoning Commission's Response dated October 11, 2023 ("Commission's Response").

Despite Appellant's contention, the 45-day clock does not start to run until the record has been closed. To do otherwise would require the Commission to render a decision without the ability to review the complete record, which includes all relevant facts, supporting documents, comments from various agencies, staff and legal counsel. The record for this Application was not closed until June 8, 2023, when Chairman Wheatley stated, "All right then, so we will now officially close the record for Stillwater Harbor."⁴ On June 22, 2023, the Commission voted unanimously to deny the Plan.⁵ This vote took place fourteen (14) days after the record was closed and was well within the 45-day period.

² See Appeal Letter, pp. 2, 9-10.

³ Commission's Response, p. 9.

⁴ Commission's Response, p. 10 (*citing* 6/8/23 Tr. at 12:4, Exhibit R).

⁵ See Appeal Letter, p. 2; Commission's Response, p. 3, FN 10 (*citing* 6/22/23 Tr. at pp. 20-21, Exhibit I).

The Commission Engaged in an Orderly and Logical Review of the Evidence which Involved the Proper Interpretation and Application of the Law.

The Commission provided comprehensive reasons for its unanimous denial of the Plan. In fact, the Commission's motion covered 19 pages of transcript and contained 12 reasons, three of which contained between six and eight subsections with additional points. This is one of the longest motions the Commission has presented. It clearly demonstrates the Commission's decision was the result of an orderly and logical review of the evidence, that there was substantial evidence in the record to support its decision and that it engaged in the proper interpretation and application of the chapter.

In its Appeal Letter, Appellant relies upon a Delaware Supreme Court decision which held that, "people who own land zoned for a specific use are entitled to rely on the fact that they can implement that use, provided the project complies with the subdivision ordinances subject to reasonable conditions imposed by the Planning Commission to minimize impact."⁶ However, the Plan simply does not comply with Sussex County Code, § 99-17B and the Appellant did not effectively address the mandatory considerations for all subdivision applications in Sussex County Code, § 99-9C.

A. The Plan Does Not Comply with Sussex County Code, § 99-17B.

First, Sussex County Code, § 99-17B, mandates that, "the access to the subdivision shall be from a public highway having a width of at least 50 feet". The record includes testimony from the Appellant's engineer that the width of the right of way varies from 42 to 46 feet.⁷ Appellant's statement that there will be a future "public dedication along the frontage of the property"⁸ does not resolve noncompliance with the 50-foot standard. As pointed out by the Commission, "even if Stillwater could expand River Road to fifty feet solely along its frontage, this would not satisfy the Code, which requires that the "public highway" must have a width of at least fifty feet. That means the entire roadway, not just the limited frontage along a subdivision."⁹ This is especially significant because no plan was introduced into the record indicating that either DelDOT or DNREC plan to widen, raise or otherwise improve River Road to bring it into compliance with the 50-foot requirement.¹⁰ Moreover, except for Appellant's offer to dedicate lands along the frontage of Stillwater Harbor to widen that portion of River Road, Appellant did not provide plans for remedial measures to bring the entire road into compliance.¹¹ The Appellant's failure to provide Code compliant subdivision access left the Commission no choice but to deny the Plan.

⁶ See Appeal Letter, p. 1 (citing *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, 962 A.2d 235, 241 (Del. 2008) (*en banc*)).

⁷ See Commission's Response, pp. 2-5 (citing 4/27/23 Tr. at 44:4-7, Exhibit H).

⁸ Appeal Letter Reply, p. 3.

⁹ See Commission's Response, p. 5, FN 21.

¹⁰ Commission's Response, p. 5.

¹¹ *Id.* (citing 4/27/23 Tr. at 23:9-10 and 43:1-4, Exhibit K).

B. The Plan Does Not Comply with Sussex County Code, § 99-9C.

Second, Sussex County Code § 99-9C sets forth seventeen (17) mandatory factors the Commission must consider in its decision whether to approve or deny a subdivision plan.¹² Of these factors, the record demonstrates that Appellant’s Application and presentation did not adequately address concerns in the following categories: integration into the existing terrain and surrounding landscape, the reservation of natural and historical features, the minimization of tree, vegetation and soil removal and grade changes, the prevention of surface and groundwater pollution, the minimization of erosion and sedimentation, changes to groundwater levels, or increased rates of runoff, deficiencies of River Road which does not provide for safe vehicular and pedestrian movement within the site and to adjacent ways and the effect on schools. Each of these deficiencies were outlined in detail in the Commission’s reasons for denying the Plan and, specifically, reasons 11.a. – f.¹³

C. The Imposition of Conditions will not Rectify Ongoing Flooding.

Third, while the Appellant argues that approval is required subject to the imposition of reasonable conditions, imposing conditions based on Appellant’s wide-ranging deficiencies under Section 99-9C and § 99-17B will not bring the Plan into compliance. For instance, the frequent flooding of River Road was emphasized in hearing testimony¹⁴ and in an opposition letter from the Indian River Volunteer Fire Company (“IRVFC”), which stated in part:

¹² Sussex County Code, § 99-9C requires consideration of the following factors prior to subdivision approval:

- (1) Integration of the proposed subdivision into existing terrain and surrounding landscape.
- (2) Minimal use of wetlands and floodplains.
- (3) Preservation of natural and historical features.
- (4) Preservation of open space and scenic views.
- (5) Minimization of tree, vegetation and soil removal and grade changes.
- (6) Screening of objectionable features from neighboring properties and roadways.
- (7) Provision for water supply.
- (8) Provision for sewage disposal.
- (9) Prevention of pollution of surface and groundwater.
- (10) Minimization of erosion and sedimentation, minimization of changes in groundwater levels, minimization of increased rates of runoff, minimization of potential for flooding and design of drainage so that groundwater recharge is maximized.
- (11) Provision for safe vehicular and pedestrian movement within the site and to adjacent ways.
- (12) Effect on area property values.
- (13) Preservation and conservation of farmland.
- (14) Effect on schools, public buildings and community facilities.
- (15) Effect on area roadways and public transportation.
- (16) Compatibility with other area land uses.
- (17) Effect on area waterways.

¹³ See Commission’s Response, Exhibit I.

¹⁴ See, e.g., Commission’s Response, p. 2. See also FN 4 (citing Testimony of Kenneth Clark, 4/27/23 Tr. at 36:19-24 and 37:5-6, Exhibit D).

It would be a grave disparity not to highlight ... the drainage deficiencies that continue to pla[g]ue this specific area during conditions of inclement weather and tidal conditions. These deficiencies for the most part remain outstanding with no corrective action for any remedy in the designated area of this proposed subdivision...The proposed development entranceway on River Road clearly lies between two significant areas of roadway tidal flooding on River Road which would preclude any successful passage during these tidal conditions.¹⁵

DNREC also raised the flooding and drainage issue, stating:

Residential properties and roads also flood regularly because of local runoff because of stormwater, drainage, and transportation infrastructure that is undersized or in disrepair" and that, "[d]rainage deficiencies included undersized or non-existent storm drain systems, storm drain systems that require maintenance, and low ground surface elevations. These deficiencies result in problems such as localized flooding, backwater flooding from inland marsh. or coastal inundation directly from Indian River Bay.¹⁶

DNREC and the Secretary of Delaware Department of Agriculture (the "Secretary") also expressed concern that the removal of forest lands will likely result in increased drainage issues and flooding risks to current and future residents.¹⁷ The Commission found that the Appellant did not seek alternative designs to mitigate the known drainage and flooding risks from the proposed forest removal despite the concerns expressed by DNREC and the Secretary.¹⁸

Appellant relies on Soil Conservation standards stating that it will reduce stormwater runoff from Stillwater Harbor.¹⁹ While there may be less water leaving the site itself, Appellant acknowledges that most of the water comes from off-site sources,²⁰ that "River Road is closed during these events,"²¹ and that flooding "is a regional problem...[that] is not going to go away...if the Stillwater community is not built."²² The flooding will occur regardless of the Appellant's actions to decrease runoff from the site, because the main source of water is coastal flooding which is beyond its control. Whatever the source, drainage and flooding will continue to be a risk. Appellant's engineer clearly stated that it will not be raising the road, which has been offered as one type of remedial measure.²³ The Commission's decision prevents an additional 123 households from being subject to this risk.

¹⁵ Commission's Response, p. 1. *See also* FN 2.

¹⁶ Commission's Response, p. 2. *See also* FN 3.

¹⁷ Commission's Response, Exhibit M and Exhibit N, respectively.

¹⁸ Commission's Response, Motion, 6/22/23 Tr. 15:19-17:14, Exhibit I.

¹⁹ Appeal Letter, p. 6.

²⁰ Commission's Response, 4/27/23 Tr. at 45:6-14, Exhibit E.

²¹ Commission's Response, 4/27/23 Tr. at 45:17-18, Exhibit E.

²² Commission's Response, 4/27/23 Tr. at 2:25 and 3:1-4, Exhibit F.

²³ *Id.* (citing 4/27/23 Tr. at 22:20-24; Exhibit J).

The excessive flooding will also have a direct impact on transporting children to and from Stillwater Harbor. Currently, when River Road is flooded, local school children are frequently picked up and dropped off at the fire hall rather than their homes due to road closure.²⁴ Based on hearing testimony, the Commission found that this "is a safety concern that currently exists and it should not be made worse by approving more development with more school children who cannot be picked upon and dropped off at their regular location because of frequent weather events"²⁵

This safety concern will only be exacerbated by adding 1258 new daily vehicular trips on River Road as a direct result of the 123 new lots in Stillwater Harbor. This is in addition to the current 742 daily vehicular trips²⁶ and puts more people and vehicles at risk during an adverse flooding event.

D. Jackson Draine Lane Does Not Benefit the Stillwater Harbor Lots and is Inadequate to Solve the Emergency Access Concern.

Fourth, while the Appellant attempts to rectify the flooding issue through use of Jackson Draine Lane for emergency access, Jackson Draine Lane is a "12-foot-wide unimproved road"²⁷ which is a private easement benefiting a limited number of properties. Stillwater Harbor's 123 lots are not among those properties benefiting from the easement.²⁸ In attempt to gloss over this issue, Appellant relies on 16 *Del. C.* §6701A for the premise that a fire company is authorized to trespass on property in response to a fire or other emergency.²⁹

The Appellant also proposed to allow the Stillwater Harbor residents to access Jackson Draine Lane during emergencies despite the fact that the Stillwater Harbor lots are not subject to the easement.³⁰ The Commission heard testimony in opposition to such use by property owners who legally benefit from the easement.³¹

Further, Appellant did not offer to make any improvements to Jackson Draine Lane, nor did it provide the Commission with evidence that it has the authority to make any improvements to the easement, including those that would be necessary to make it safe for emergency vehicles such as fire trucks.³²

²⁴ Commission's Response, p. 6. *See also* FN 26 (*citing* Tr. testimony in Exhibit O).

²⁵ Commission's Response, p. 6 (*citing* Motion, 6/22/23 Tr. at 19:20-24, Exhibit I).

²⁶ Commission's Response, p. 8; Appeal Reply Letter, p.1

²⁷ The Commission's Motion stated that Jackson Draine Lane "is currently an 8- to 12-foot-wide dirt or sand and gravel road with potholes and varying levels of repair." Commission's Response, Motion, 6/22/23 Tr. 10:14-17, Exhibit I.

²⁸ Commission's Response, Exhibit P.

²⁹ See Appeal Letter, p. 6, FN 4; Appeal Reply Letter, p. 3, FN 3.

³⁰ *Id.*

³¹ Commission's Response, p.8.

³² Commission's Response, Motion, 6/22/23 Tr. 10:18-25. Exhibit I.

The Commission cannot condone the unauthorized use and make land use decisions for the general public welfare, based on foreseeable trespasses over property that is not part of Stillwater Harbor. That would be overreaching and could result in Jackson Draine Lane becoming a regularly used means of ingress and egress for Stillwater Harbor lot owners which, for a multitude of reasons, it is clearly not suitable.

Conclusion

The foregoing facts demonstrate multiple deficiencies in the Plan presented to the Commission. These facts were collectively confirmed by statements in the record at the public hearing and, as the Commission explained in the Commission's Response, there is substantial evidence in the record to deny the Plan based solely on Appellant's inability to comply with Sussex County Code § 99-17B³³, let alone § 99-9C.³⁴

The Commission's findings include detailed, thorough and well-thought-out reasons for its unanimous vote to deny the Plan. Of utmost importance, is the failure to provide Code compliant subdivision access over a public highway that is at least 50 feet in width as mandated by the Sussex County Code. River Road simply does not satisfy this requirement. Dedicating additional road frontage along Stillwater Harbor will only widen a portion of River Road leaving additional roadway with a width less than the mandated 50 feet. This deficiency is only exacerbated by the road's habitual flooding, which is common and well-known in the area, and was acknowledged by the Indian River Volunteer Fire Co., DelDOT, DNREC and the Appellant's own engineer's testimony at the public hearing³⁵, as well as that of local residents. Appellant cannot rely on Jackson Draine Lane for emergency access as it is a private easement that does not benefit the Stillwater Harbor lots. Even if it did benefit the Stillwater Harbor lots, Jackson Draine Lane is a "12-foot-wide unimproved road" which is clearly inadequate for this purpose.

Therefore, the Commission's decision must stand.

³³ Commission's Response, pp. 4-5.

³⁴ See Commission's Response, pp. 5-7.

³⁵ See FN 15-23, *supra*.